Office-Supreme Court, U.S.
FILED
JAN 31 1963
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 625

TEXACO PUERTO RICO, INC.,
PETITIONER,

v.

SOL LUIS DESCARTES, TREASURER OF PUERTO RICO,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

BRIEF FOR RESPONDENT IN OPPOSITION

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Blanchard Printing Company, Boston, Mass. — Law Printers

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Opinions Below

The opinion of the Circuit Court of Appeals for the First Circuit (Supp. to Petition, p. 11) is reported at 304 F2d 184 (1962). The opinion of the Supreme Court of Puerto Rico is unreported in its English version and is printed in the Record Appendix, p. 39. The opinion of the Tax Court of Puerto Rico, printed in the Record Appendix, p. 13, is unreported in English.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition, except that on November 23, 1962 this Court entered an order signed by Mr. Justice Arthur J. Goldberg, extending the time to file petition for certiorari to and including December 3, 1962.

Statement

The facts in the present case were agreed to by the parties involved. (Record Appendix, pages 10-12) We will summarize them as follows:

At midnight on January 17-18, 1948 "SS Fort Lane" arrived in the San Juan harbor and docked at Pier No. 13 with a cargo of kerosene from Aruba. Of the total cargo destined to three dealers of petroleum products in Puerto Rico, a few thousand gallons were lost by evaporation, or otherwise. Deduction of this loss was allowed.

At 1:40 of that night, the discharge of the kerosene from the vessel to the tanks of the petitioner started. This was done by means of devices belonging to the petitioner and under the close inspection of its employee, Richard B. Polk.[1]

The discharge continued in a normal way and about 4:45 a.m. Mr. Polk, who had withdrawn to Pier 14 about 3:30 a.m., returned to Pier No. 13 where he found that the valve to discharge the kerosene was partially open and that a device called "blind flange", which is used as an added security measure during the unloading, was not attached to the valve.

The parties stipulated that "due to the negligence of the dock foreman, an employee of the plaintiff, who being

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[1] A deposition of Mr. Polk was admitted in evidence as part of the stipulation submitted by the parties to the Tax Court. (Record Appendix, pages 74-79)

responsible for the proper operation of the receiving lines or pipes of the plaintiff, left partially open plaintiff's valve to receive kerosene located in Pier No. 13, and who also failed to attach the blind flange to the valve as an added measure of security" a loss of 183,136 gallons of kerosene took place.

The petitioner, then, "without any previous requirement from the Treasurer of Puerto Rico" (Record Appendix, page 1) paid to the latter the sum of $5,494.08, which was the amount of the excise taxes on the lost kerosene.[2] In the amended complaint filed before the Tax Court the petitioner stated the request of the refund of that amount and the refusal of same by the Treasurer.

It was alleged by the herein petitioner that the decision of the Treasurer of Puerto Rico, the respondent, was null and illegal because the People of Puerto Rico had no power in law to levy and collect internal-revenue taxes, taking as a taxable event the mere introduction or importation of goods into the Island. It was also alleged that the article on which the tax was levied was never introduced into Puerto Rico. Finally, it was stated that the kerosene brought by the petitioner to Puerto Rico was exempt from such taxes pursuant to the provisions of Act No. 426 of May 14, 1947.

The Supreme Court of Puerto Rico, Mr. Justice Hernandez Matos delivering the opinion of the court, held that Puerto Rico had authority to impose the tax in the present case, stating:

> "Puerto Rico received from the United States Congress in clear, ample, and precise terms, on the sole condition of uniformity in its exercise, the necessary

[2] The remaining shipment was delivered to the other importers by the "Fort Lane" the next day in the Mayaguez harbor, and on January 20 in the Ponce harbor. (Record Appendix, pages 62-63)

fiscal power to levy and collect, with regard to imports and as soon as the merchandise was introduced into Puerto Rico, the same internal-revenue taxes it would levy and collect on articles manufactured locally."

The Court also held, as to the allegations that the kerosene was subject to a tax exemption, that the Petitioner had not exhausted the administrative remedy before the Treasurer, as a prerequisite for judicial determination.

The Circuit Court of Appeals affirmed the judgment of the Supreme Court of Puerto Rico which in turn affirmed the judgment of the Tax Court of Puerto Rico. Our argument will show that the decision below is right and that, consequently, the petition should be denied.

Argument

The first reason for not granting certiorari in this case is offered, not by Respondent, but by Petitioner. It says in the conclusion of the Petition (p. 12):

> "The question now before this Court is a recurring question; in the Petition for Certiorari filed with this Court in the case of *Tecon Corporation, Petitioner* v. *Secretary of the Treasury of the Commonwealth of Puerto Rico*, No. 900 (certiorari denied),[3] a similar levy was done in connection with machinery which was exclusively utilized in a federal base in Puerto Rico."

It should be obvious that if Petitioner in the *Tecon* case did not induce this Court to grant certiorari, the writ herein petitioned should be denied when the question now before the Court is a "recurring" one.

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[3] October 8, 1962.

There are two basic issues before this Court in this case. One was stated by Mr. Chief Judge Woodbury in the opinion of the Circuit Court, as follows: "[w]hether in 1948[4] federal law authorized the Puerto Rican Legislature to impose an excise tax on the kerosene lost into the harbor under the circumstances in this case." The decision of the Circuit Court recognized that the Puerto Rican Legislature was so authorized; to that effect it cited *West India Oil Co.* v. *Domenech*, 311 U. S. 20, 27, 28 (1940) and one of its own cases, to which we will refer further on.

The other question is one of local law: if the kerosene spilled into the San Juan harbor in the process of unloading, had been "introduced into Puerto Rico" according to a section of a Puerto Rican law to which we will also make reference later on.

We will now turn to the first issue.

The Puerto Rican Organic Act of March 2, 1917, 39 Stat. 953, known as the Jones Act, empowered Puerto Rico by virtue of its Section 3, to levy and collect internal-revenue taxes. This power, however, was not exercised in an effective way because the tax could not be levied and collected on the pertinent articles, *at the time of their importation or introduction* into the Island. Because of this situation the then Governor of Puerto Rico, the persons in charge of the insular affairs in Washington and our own Resident Commissioner in Congress, Mr. Cordova Davila, decided to join their efforts in order to solve what was acknowledged to be a stumbling block in Puerto Rico's economic development.[5] Their work was finally channelled into two bills, introduced in the Senate and in the House of Repre-

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[4] The facts of this case took place before the important legislation that in 1952 created new legal and political changes in the relations between Puerto Rico and the United States. Vide: *Puerto Rican Federal Relations Act*, 64 Stat. 319 (1950).

[5] *Congressional Record*, Vol. 67, Part II, House July 2, 1926, p. 12775.

sentatives of the United States Congress, amending the above mentioned Sect. 3.

The Senate Bill (No. S-4247) was finally approved on March 4, 1927 and it has been called since, the Butler Amendment.

Before looking at the wording of the amendment itself, let us state that it was approved without any opposition and with a clear understanding by Congress of the Puerto Rican problem. The best evidence of it are the words pronounced by Congressman Mr. Kiess while the bill was under discussion:[6]

> "In making use of the authority granted by Section 3 to levy and collect internal-revenue taxes the government of Porto Rico has found itself unable to collect said taxes on articles purchased in and sent from the United States to Porto Rico by mail, or sometimes when said articles are sent by vessel, as the courts have held that the post-office or customs officials have no authority to withhold delivery of such articles subject to the internal-revenue tax until the tax is paid, *as such tax collected in this manner is in effect a customs duty.* In other words, the courts have held that the internal-revenue tax can not be collected while the article subject to the tax is in the original package.
>
> "This condition of affairs *has practically nullified the power of the insular government to levy internal-revenue taxes,* and therefore the efficacy of this source of revenue has been seriously impaired.
>
> "*For the purpose of righting this situation* a new provision is added to Section 3.
>
> "It is expected that the government of Porto Rico

[5] Act of March 4, 1927, 44 Stat. Part II, 1418.
[6] Ibid, page 12775.

will so make use of this power as not to unnecessarily place any barriers in the way of the free-trade conditions now existing between [Puerto Rico] and the mainland, which is the principal factor in the progress and prosperity of Porto Rico." (Emphasis supplied.)

By virtue of the Butler Amendment Section 3 of Puerto Rico's Organic Act came to read:

> "And it is further provided, That the internal-revenue taxes levied by the Legislature of Puerto Rico in pursuance of the authority granted by this Act on articles, goods, wares, or merchandise may be levied and collected as such Legislature may direct, on the articles subject to said tax, *as soon as the same are manufactured, sold, used, or brought into the Island;* Provided, That no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico. The officials of the Customs and Postal Services of the United States are hereby directed to assist the appropriate officials of the Puerto Rican government in the collection of these taxes."[7] (Emphasis supplied.)

Three months after the Butler amendment was approved the Puerto Rico Legislature amended its Internal Revenue Act of 1925[8] to include among taxable events the *introduction* into Puerto Rico of articles subject to tax.

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[7] The Act amended also Section 48 to which the following paragraph was added:

> "That no suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the District Court of the United States for Puerto Rico."

[8] Act No. 85, August 20, 1925, as amended by Act No. 17 of June 3, 1927.

It should be noted, that at the time of the approval of the Butler Amendment in 1927, the Supreme Court of the United States had adopted a definite constitutional doctrine with respect to territories. As to Puerto Rico the Court had decided in *Balzac* v. *Puerto Rico*, 258 U. S. 298 (1921) that the island was not incorporated into the United States by the Organic Act of 1917. Consequently, Congress could legislate with respect to Puerto Rico in any manner it saw fit, subject only to certain constitutional limitations.

Having this brief legislative history in mind let us examine the decision that clearly rules the facts of the instant case.

In *West India Oil Co.* (*P.R.*) v. *Domenech*, 311 U. S. 20 (1940) the Supreme Court of the United States had before it the following facts.

The West India Oil Co. (P.R.) was a domestic corporation engaged in importing, purchasing, and selling oil and products derived from the same. To facilitate business the corporation set up and maintained a bonded tank in the city of San Juan which was used to receive and deposit fuel oil brought from foreign countries to Puerto Rico. This oil remained in the tank for a period of time until it was re-exported to a foreign country, delivered to the steamers that purchased it to be used as fuel for their engines or delivered to purchasers for use in Puerto Rico; while in the bonded tank the oil was under the control of the customs service of the United States. The then Treasurer of Puerto Rico imposed a 2% sales tax upon oil delivered to vessels in Puerto Rican ports upon sales for use as ship's stores, as indicated. The tax was authorized by Sect. 16(a) 62 of the Internal Revenue Act of Puerto Rico, as amended by Act No. 17 of June 3, 1927.

This Court, considering the legality of such disposition, quoted the pertinent part of the "proviso" added by the

Butler Amendment to Section 3 of the Organic Act and stated:

> "The plain purport of the words of this proviso is that any tax authorized by the Organic Act with respect to articles of domestic production may likewise be levied with respect to imported articles 'as soon as . . .[they] . . . are manufactured, sold, used, or brought into the island' provided only that there be no tax discrimination between articles brought from the United States and foreign countries and domestic articles. The amendment seems to have been occasioned by doubts which had arisen whether merchandise brought to the Island from the United States was subject to local taxation while in the original package and also whether the merchandise has, while in the control of the customs authorities, the same status as respects local taxation as goods similarly controlled which have been imported from foreign countries and whether the power of the insular legislature to tax imports from foreign countries was any greater than that of the states which are forbidden, by Clause 2, of § 10 of Art. I of the Constitution, to tax imports and exports without consent of Congress . . .
>
> Moreover practical difficulties appear to have been experienced in levying insular taxes upon goods on their arrival from the United States and while in the custody or control of postal or customs officers; due to the fact that the local tax *while in its practical effect a customs duty* was not collected by postal or customs officials. S. Rep. No. 1011, 69th Cong., 1st Sess. *The doubts and the difficulty were removed by the amendment to § 3*, giving the Congressional consent that articles should be subject to the taxing jurisdiction of the Puerto Rico legislature as soon as

> brought into the Island whether from the United States or from foreign countries, and directing that the United States customs officials and postal service should aid local officers in the collection of the tax. The effect of the broad language of the amendment was not only to subject to taxation all imported goods, whether from the United States or foreign countries, when brought into the island in the original package, *but to neutralize the regulatory effect of the customs laws and regulations in so far as they protected articles from local taxation after their arrival.* Merchandise in the original package was thus subjected to tax when brought into the Island without regard to customs regulations. . . ." (Emphasis supplied.)

It is clear then, from the language used by this Court in the above mentioned case that the Butler Amendment authorized the Puerto Rican Legislature to impose taxes which in their practical effect amounted to a customs duty or impost on imports.[9]

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[9] Petitioner "calls the attention of the Court to the direct legislative act of Congress in the year 1934, after the Butler Amendment, to permit Puerto Rico to levy a custom duty on coffee. . . ." (Petition, p. 7) To that effect two cases are cited: *Puerto Rico Brokerage Co. Inc.* v. *U. S.*, 71 F2d 469; 76 F2d 605. It is accepted at the outset that a custom duty was involved in these cases: Congress authorized Puerto Rico, by two acts (Tariff Act of 1930, Sect. 319; 19 USCA 1319a) to impose tariff duties upon coffee grown in a foreign country coming into Puerto Rico from the United States.

No provision was made in these enactments, as in the Butled Amendment, to the effect that "no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico". This clearly indicates the congressional intention to authorize by one method the levying and collection of internal revenue taxes in the Butler Amendment even though such taxes may in effect be duties or imposts on imports, and to authorize by another method the imposition of a custom duty in the above mentioned acts. Both variations were within the powers of the Congress under the territorial clause.

The position adopted by this Court is obviously based on the broad powers given Congress under the second paragraph of Article IV, Section 3 of the Constitution of the United States.

The power given to Congress with respect to territories has been characterized by this Court as a "sweeping" one. *Puerto Rico* v. *Shell Co.*, 302 US 253, 263 (1937).

In *Hooven & Allison Co.* v. *Evatt*, 324 US 652, 674 (1944) this Court stated:

> "In exercising this power, Congress is not subject to the same constitutional limitations, as when it is legislating for the United States. See *Downes* v. *Bidwell, supra*;[10] *Hawaii* v. *Mankichi*, 190 U.S. 197; *Dorr* v. *United States, supra*;[11] *Dowdell* v. *United States*, 221 U.S. 325, 332; *Ocampo* v. *United States*, 234 U.S. 91, 98; *Public Utility Commissioners* v. *Ynchausti & Co., supra*,[12] 406-407; *Balzac* v. *Porto Rico, supra*.[13]
>
> And in general the guaranties of the Constitution, save as they are limitations upon the exercise of executive and legislative power when exerted for or over our insular possessions, extend to them only as Congress, in the exercise of its legislative power over territory belonging to the United States, has made those guaranties applicable. See *Balzac* v. *Porto Rico, supra*."

In the light of this jurisprudence the Puerto Rican people have attained economic progress. The legislative history of the Butler Amendment shows that the interpretation that was being given to Section 3 of the Organic Act was, precisely, detaining that progress. It is clear that Congress

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[10] 182 U.S. 244 (1901)
[11] 195 U.S. 138 (1904)
[12] 251 U.S. 401 (1919)
[13] 258 U.S. 298 (1921)

intended to recognize the complete legislative powers of the Puerto Rican Legislature with respect to local matters. That is why the statement made by the Court of Appeals, to the effect that the tax involved in the case at bar was a tax which Congress in the exercise of its plenary power in the premises had authorized the insular legislature to impose, is clear, forceful and correct.

As to the second question raised by the Petition we have already stated that it is a matter of local law.

Section 16 of Act No. 85 of August 20, 1925, Laws of Puerto Rico 1925, p. 584, 590, as it stood amended in January 1948, read in its pertinent part as follows:

> "Section 16.—There shall be collected and paid once only, as an internal-revenue tax on the following articles sold, transferred, used or consumed in or introduced into Puerto Rico, and on the articles comprised in this section of the law.
>
> * * *
>
> 29. *Kerosene.*—On all illuminating oils or substitute therefor, sold, transferred, used, or consumed in, or introduced into, Puerto Rico, a tax of three (3) cents a gallon."

The Supreme Court of Puerto Rico decided, and the Court of Appeals for the First Circuit affirmed, that, when 183,136 gallons of kerosene were spilled into the San Juan harbor, in the process of unloading, because Petitioner employees on the dock had negligently failed fully to close a valve, (and as an added precaution to seal it with a "blind flange") in the pipeline through which the kerosene was being pumped from the vessel to Petitioner's tanks on shore, the kerosene was "introduced into Puerto Rico", within the meaning of the above section. This is a reasonable construction of the statute.

In *Bonet* v. *Texas Co.*, 308 U.S. 463, 470-471 (1939) this Court reiterated what it said was a rule of "over sixty years":[14]

> "For over sixty years this Court has consistently recognized the deference due interpretations of local law by such local courts unless they appeared to be clearly wrong. From *Sweeney* v. *Lomme*, 22 Wall. 208, decided in 1874, to *Bonet* v. *Yabucoa Sugar Co.*, *supra*, decided in 1939, repeated admonitions to that effect have been given. That rule is founded on sound policy. As this court recently stated, 'Orderly development of the government of Puerto Rico as an integral part of our governmental system is well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the Island.' *Bonet* v. *Yabucoa Sugar Co.*, *supra*, p. 510.
>
> We now repeat once more that admonition. And we add that mere lip service to that rule is not enough. To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the Puerto Rican tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one. For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous."

[14] To the same effect is *De Castro Board of Commissioners*, 322 U.S. 451 (1943).

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

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